APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

[FILED AUG 21, 2006]

NO. 05-3558

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP L. PROCTOR	)	
Plaintiff-Appellant,	)	ON APPEAL FROM
	)	THE UNITED STATES
v.	)	DISTRICT COURT
	)	FOR THE SOUTHERN
UNITED STATES	)	DISTRICT OF OHIO
DEPARTMENT OF	)	
EDUCATION,	)	
Defendant-Appellee.	)	

Before: BATCHELDER, GIBBBONS, and COOK, Circuit Judges.

COOK, Circuit Judge. Philip Proctor sued the Department of Education ("DOE") challenging DOE's decision to garnish his wages in payment of defaulted student loans. DOE counterclaimed for the amount allegedly outstanding on Proctor's student loans. Proctor also advanced tort claims against United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). The district court granted the defendants' motion for summary judgment, and Proctor argues on appeal that genuine issues of material fact precluded

summary judgment. We affirm.

I

Proctor financed his ten-year higher education with sixteen student loans. Various agencies guaranteed the loans and, after Proctor defaulted, the guarantors paid the lenders and sought payment from Proctor. Proctor paid five of the loans, and the guarantors assigned the remaining eleven to DOE. In 2000, DOE initiated a garnishment action.

Proctor requested a hearing from DOE regarding the garnishment, maintaining that he paid off his student loans in 1995. Proctor complained that his records reflecting the loan payments were stolen when a lock box was taken from his house in 1995 and that his banks had since purged the records relating to his accounts. The hearing officer ruled that the garnishment could proceed because Proctor failed to show that he paid the loans.

Proctor then sued, asking the district court to review DOE's decision. He also brought FTCA claims against United States, alleging defamation, invasion of privacy, and intentional infliction of emotional distress related to the garnishment action. DOE counterclaimed for the amount it alleged to be outstanding on Proctor's student loans. The district court granted summary judgment in favor of the defendants. It held that DOE did not arbitrarily or capriciously allow garnishment, that no genuine issue existed as to whether Proctor owed the money, and that sovereign immunity shielded the United States form Proctor's FTCA claims.

II

We review a grant of summary judgment de novo, examining the evidence in the light most favorable to Proctor

and affirming summary judgment only if there is no genuine issue as to any material fact. *Nat'l Solid Wastes Mgmt. Ass'n v. Daviess County*, 434 F.3d 898, 902 (6th Cir. 2006).

A. Summary Judgment as to Outstanding Loans

Proctor contends the district court committed multiple errors in awarding summary judgment to DOE on his challenge to the garnishment action and on DOE's counterclaim. Proctor argues that the district court mishandled discovery and that he raised sufficient defenses to trump DOE's counterclaim. We disagree.

1. Discovery

Proctor complains that the district court erred in denying his motion to compel certain discovery. The district court enjoys broad discretion in handling discovery disputes. *See Brainard v. AM. Skandia Life Assur. Corp.*, 432 F.3d 655, 664 (6ht Cir. 2005). Here, the court found that DOE sufficiently complied with Proctor's discovery requests by providing "the name, address and telephone number of every entity that held plaintiff's student loans, and every collection agency that provided collection services with respect to those loans." Proctor offers nothing to suggest that the district court abused its discretion other than his assertion that this ruling conflicts with *United States v. Rhodes*, 788 F. Supp. 339 (E.E. Mich. 1992). *Rhodes*, however, neither conflicts with the district court's ruling–the *Rhodes* court held only that the government must produce evidence in order to survive a motion for summary judgment–nor binds the district court. Accordingly, we find that the district court did not abuse its broad discretion.

2. Proctor's Defenses

Proctor argues that the district court erred in granting DOE summary judgment on its counterclaim. Proctor contends first that the district court improperly placed the burden on him to prove payment and that, in any event, he met his burden by raising a genuine issue of material fact with regard to whether he paid the loans. He also argues that the government failed to produce any admissible payment histories, that the student loans are contractually unenforceable, and that laches bars the government's claim.

a. Repayment

Proctor maintains that the district court improperly placed the burden on him to show that he paid his loan debts. But the court got it right–and it is Proctor who misstates the burden-shifting rules. DOE satisfied its initial burden on its counterclaim by showing that Proctor "signed promissory notes, received student loans . . . , and defaulted on his repayment obligations." *United States v. MacDonald*, No. 93-1924, 1994 WL 194248, at *2 (6th Cir. May 16, 1994). At that point, it was up to Proctor to present evidence supporting his defense of repayment and although Proctor "asserted that he had repaid his student loan in full," he "did not meet his burden of proving the . . .extinguishment . . . of the obligation." *United States v. Davis*, 28 F. App'x 502, 503 (6th Cir. 2002); see *U.S. v. Irby*, 517 F.2d 1042, 1043 (5th Cir. 1975)("The [district] court erroneously ruled that the Government had the burden of showing whether all appropriate credits to the account had been given, whereas the burden should have been placed upon defendants . . . ."). The court below correctly found that the burden fell to Proctor to demonstrate repayment and that Proctor failed to present probative evidence that he repaid his

loans.

Proctor protests that he could not present evidence of repayment because the lock box in which he kept his student loan documents was stolen in 1995 and because the government did not supply him with sufficient payment histories during discovery. But the misfortunes that hampered Proctor's ability to demonstrate repayment do nor relieve him of his burden and, as discussed above, the district court did not abuse its discretion in its discovery rulings.

Proctor also alleges that his payments were credited to another borrower's account. He points to the inclusion of that borrower's documents in his file–documents relating to three loans to Scott Wiermaa. Proctor notes that his social security number is only one digit off from Wiermaa's. But nothing suggests that Wiermaa received credit for any of Proctor's payments. Although some "Insurance Claim Payments" were erroneously credited to Wiermaa's account, those payments are consistent neither in timing nor amount with any payments Proctor claims to have made. That some of Wiermaa's records ended up in Proctor's file is not evidence of Proctor's payment of his loans.

Proctor also notes that Sallie Mae held his loans for a short time, and some of its records listed Proctor's social security number beginning with 999 or 979 rather than 479. But Sallie Mae corrected the number in its system, and its involvement with the loans ended in 1992, well before Proctor claims to have paid the loans. The typographical error does not save Proctor's case.

Proctor further complains that many of the payment records that the government presented constituted inadmissible hearsay. But even if Proctor is correct, the other evidence DOE offered, to which Proctor did not object–for example, affidavits and collection letters reflecting Proctor's overdue debt–sufficiently demonstrated that the loans were defaulted

when DOE acquired them. The district court pointed to the objected-to documents only in concluding that DOE "submitted sufficient evidence . . . to show that the . . . loans at issue . . . have not been paid by Proctor." Given that Proctor is responsible for showing payment (rather than DOE for showing nonpayment), Proctor's failure to offer any probative evidence of payment renders harmless any error on the district court's part in considering these documents. See *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6ht Cir. 2004) ("'In order to survive a motion for summary judgment, the non-moving party must be able to show sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy.'" (quoting *Godfrey v. Pulitzer Publishing Co.*, 276 F.3d 405, 412 (8th Cir. 2002) (alterations in original) (internal quotation omitted))).

b. Contract Law and Promissory Estoppel

Proctor takes the position that principles of contract law and promissory estoppel prohibit the government from enforcing his promissory notes. He points to a clause in some of the notes providing that the loans are governed by federal regulations adopted under the Higher Education Act. He then argues that federal regulations required the government to procure payment histories on his accounts from the guaranty agencies and that the government neglected to do so here, rendering the promissory notes unenforceable. But even if we assume that Proctor could otherwise prevail on such a theory, his arguments fail because the regulations to which he points specifically permit DOE to "accept the assignment of a loan without all of the documents" and require the agency to retain documents only "[i]f directed to do so." *See* 34 C.F.R. § 682.409(c)(6). Thus Proctor identifies no failure by DOE to adhere to the "federal regulations" described in the promissory

notes.

c. Laches and Due Diligence

Proctor also posits that the equitable doctrine of laches bars DOE's claim. The district court found that Congress eliminated the defense of laches for collection of student debts when it specifically eliminated the statute of limitations. The Fifth Circuit took this position in *United States v Lawrence*, 276 F.3d 193, 196 (5th Cir. 2001) ("[W]e adopt the district court's holding that [20 U.S.C.] § 1091a also extends to eliminate the equitable defense of laches."), and other district courts have held likewise. *See Hamilton v. United States*, No. 2:03cv669, 2005 WL 2671373, at *4 (S.D. Ohio Oct. 19, 2005) (holding laches inapplicable and collecting other cases). But even if laches remains a valid defense, it requires undue delay on the government's (or its predecessor's) part. DOE offers a wealth of evidence that its wage garnishment was preceded by substantial collection activities by it as well as guarantors. Proctor has not shown that DOE engaged in dilatory tactics or otherwise unduly delayed seeking legal redress.

Proctor raises a due diligence argument that mirrors his laches argument. Assuming that such an argument is cognizable in student loan enforcement cases, but see *United States v. Dwelley*, 59 F. Supp. 2d 115, 119 (D. Me. 1999) (holding that due diligence provisions in federal regulations govern only the relationship between DOE and lenders, collecting cases holding likewise), we nevertheless reject Proctor's assertion because DOE and its predecessors engaged in numerous collection attempts throughout the history of these loans.

d. Proctor's Reply Brief

In his reply brief, Proctor argues that two additional United States Code provisions, 5 U.S.C. § 552a and 20 U.S.C. § 1095a, support his case. Proctor failed to raise these arguments in his opening brief, however, and we decline to address them. See *Am. Trim, L.L.C. v. Oracle Corp.*, 383 f.3d 462, 477 (6th Cir. 2004) (noting that the court has consistently held that it will not consider arguments raised for the first time in reply).

3. Garnishment Hearing

Proctor alleges that the district court erroneously granted summary judgment on his appeal of DOE's garnishment decision. But Proctor's quarrel with the garnishment related to whether he actually owed any debt as opposed to, for example the procedures of the garnishment or whether the garnishment would result in an unreasonable financial burden. Because we find no fault in the district court's grant of summary judgment on DOE's counterclaim, we reject Proctor's protestations regarding the garnishment decision.

D. FTCA Claims

The district court found that sovereign immunity shielded the United States from liability on Proctor's FTCA claims. Proctor's sole claim or error with respect to these claims is that "the trial court failed to consider that [the United States's] defenses only apply if the . . . employee . . . was acting within the scope of his or her employment. It is not within the scope of employment to begin a wage garnishment against Proctor under the facts of this case." But if the actions were beyond the scope of employment, they were also beyond the

scope of the FTCA. *See Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993) ("Section 1346(b) states that district court jurisdiction over civil actions against the government for acts or omissions of its employees is dependent on whether the particular employee is 'acting within the scope of his office or employment.'"); 28 U.S.C. 1346(b)(1). Thus Proctor's challenge to the district court's judgment on his FTCA claims fails.

III

Because Proctor failed to produce probative evidence sufficient to withstand DOE's motion for summary judgment on its counterclaim, and because the district court correctly granted summary judgment on the remaining claims, we affirm the judgment of the district court.

APPENDIX B

[FILED DEC 05, 2006]

NO. 05-3558
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP L. PROCTOR Plaintiff-Appellant,	)	
v.	)	ORDER
UNITED STATES DEPARTMENT OF EDUCATION, Defendant-Appellee.	)	

BEFORE: BATCHELDER, GIBBBONS, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion of rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/Leonard Green
Leonard Green, Clerk

APPENDIX C

[FILED MARCH 24, 2005]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHILIP L. PROCTOR,
Plaintiff,

vs.

Case No. 2:02-CV-254
Magistrate Judge King

UNITED STATES
DEPARTMENT OF
EDUCATION, *et al.*,
Defendants.

OPINION and ORDER

Plaintiff originally brought this action against the United States of America [hereinafter "United States"] and the United States Department of Education [hereinafter "Education"] [collectively hereinafter the "Federal Parties"] challenging an administrative wage garnishment in connection with Plaintiff's alleged indebtedness to the Federal Parties on 11 student loans. The Federal Parties have asserted a counterclaim for the amounts allegedly due, plus interest. With the consent of the parties, 28 U.S.C. § 636(c), this matter is before the Court on the various motions of the parties.

I. Background

The Federal Patrties take the position that Plaintiff

Philip L. Proctor [hereinafter "Plaintiff"] is currently indebted to the United States in the amount of $79,231.95 for the balance owed on 11 notes that were executed in connection with the 11 student loans made under the Guaranteed Student Loan Program [hereinafter "GSLP"] pursuant to Title IV, Part B of the Higher Education Act [hereinafter "HEA"], 20 U.S.C. § 1071, *et seq.* [hereinafter "notes/loans"].[1] *Answer to Plaintiff's First Amended Complaint*, Doc. No. 53. Plaintiff admits that he signed the notes in question while he was in college and professional school, from 1978 through 1988. *Plaintiff's Motion for Summary Judgment*, at p. 3.[2] Plaintiff also admits that he failed to re-pay these notes/loans to the original lenders and that the original lenders assigned these notes/loans to various agencies.[3] *Id.*, at p. 6. However, Plaintiff argues that, between 1990 and 1995, the student loans were fully paid to

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[1]The Federal Parties allege that the unpaid balance due and owing to the United States from Plaintiff is $40,099.97 in principal (which includes at least $7,453.97 in capitalized interest), and $39,131.98 in interest accrued through July 14, 2003.

[2]In declaration, Plaintiff swears that all statements made by him in his motion for summary judgment, his memorandum in opposition to Defendants' motion for summary judgment and in Plaintiff's reply to Defendants' opposition to Plaintiff's motion for summary judgment are true and accurate to the best of Plaintiff's knowledge. Declaration of Philip Proctor, attached as Exhibit WW to *Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment.*

[3]The loans were assigned to the guaranty agencies between 1988 and 1990.

these agencies. *Id.*, at p. 6. The Federal Parties dispute this assertion, arguing that, between 1993 and 1997, the guaranty agencies assigned these notes/loans to Education, the Federal guaranty agency.

It should be noted that, according to Plaintiff, all records relating to his claimed payment of these student notes/loans were stored in a lockbox which was allegedly stolen. *Id.*, at p. 7. Plaintiff asserts that he has been unable to obtain payment records from any bank due to the lapse of time in this matter. *Id.*

Pursuant to 20 U.S.C. § 1095a, Plaintiff's wages are currently being administratively garnished by Education to recover the amounts allegedly due on these loans. *Complaint*, at ¶¶ 2, 3. Upon request of Plaintiff, an Administrative Wage Garnishment Hearing [hereinafter "AWG Hearing"] was held by telephone, pursuant to 20 U.S.C. § 1095a, on February 11, 2002. *Id.*, at ¶¶ 4, 5. The hearing officer thereafter determined that the administrative wage withholding was proper and should continue. *Id.* at ¶ 6; Garnishment Hearing Decision, attached to *Administrative Record*, Doc. No. 40.

On March 13, 2002, Plaintiff instituted this action seeking a preliminary and permanent injunction against Education prohibiting the administrative wage garnishment and requesting judicial review of the AWG Hearing Decision that upheld the administrative wage garnishment. Doc. No. 1.[4] On September 10, 2003, Plaintiff filed a second amended complaint asserting tort claims against the United States pursuant to the Federal Torts Claims Act [hereinafter "FTCA"], 28 U.S.C. §§ 1346(b), 2671-2680. Doc. No. 60. In their answer, the Federal Parties asserted a counterclaim against Plaintiff for the amount remaining due on the student loans at issue, plus interest. Doc.

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[4]Plaintiff's motion for preliminary injunction, Doc. No. 31, was denied by the Court. Doc. No. 51.

No. 26. Specifically, the Federal Parties request that judgment be entered against Plaintiff in the amount of $79,231.95 for principal and interest accrued through July 14, 2003, and additional interest accruing on the principal balance from that date the fate of $8.31 per day to the date of judgment, less a credit for additional amounts collected in the interim. *Answer to Plaintiff's Second Amended Complaint*, at pp. 4-5, Doc. No. 53. The Federal Parties also seek recovery of their costs and of post judgment interest. *Id.*, at p. 5.

Currently before this Court are Plaintiff's motion for summary judgment, Doc. No. 67, the Federal Parties' motion to dismiss and for summary judgment, Doc. No. 68, and Plaintiff's renewed motion for interim injunctive relief pending review of the administrative wage garnishment, Doc. No. 95.

II. Standard for Summary Judgment Motion

The standard for summary judgment is well established. This standard is found in Fed. R. Civ. P. 56, which provides in pertinent part:

> The judgment sought shall be rendered forthwith if pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Pursuant to Rule 56(c), summary judgment is appropriate if "there in no genuine issue as to any material fact . . ." In making this determination, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson*, 477 U.S. at 251.

III. Application

A. Appeal of Administrative Wage Garnishment Decision

Plaintiff seeks review of the AWG Hearing Decision that upheld the administrative wage garnishment. Administrative proceedings must be reviewed in accordance with the Administrative Procedure Act [hereinafter "APA"], 5 U.S.C. § 701 *et seq*. Under the APA, the appropriate standard of review is whether the final agency action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law..." 5 U.S.C. § 706(2)(A); *see Perkins v Paige*, 2002 U.S. Dist. LEXIS 21540 (E.D. Mich. 2002). In reviewing an agency decision under this standard, it is well-established that the court's inquiry is ultimately narrow and limited to 'whether the Secretary's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The court "is not empowered to substitute its judgment for that of the agency." *Id*. Rather, the agency's decision must be affirmed if it is rationally based. *Bowman Transportation, Inc. v. Arkansas*

Best Freight System, Inc., 419 U.S. 281, 285 (1974) ("The judicial function is fundamentally - and exclusively - an inquiry into the legality and reasonableness of the agency's action [and] matters are to be determined solely on the basis upon which the action was administratively projected"). *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 840 (D.C. Cir. 1976). *See also, Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 693 (6th Cir. 1989), *cert. denied*, 495 U.S. 905 (1990) (the arbitrary and capricious standard "is the least demanding form of judicial review" and, therefore, if the court can discern "a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary and capricious").

Upon review, this Court concludes that the agency's decision was reasonable and fully supported by the administrative record. The hearing officer reviewed the history of each note/loan at issue in this case. After reviewing this payment history, the hearing officer determined the amount owed by Plaintiff to the government on each note/loan.[5] The hearing officer's findings in this regard are fully supported by the administrative record. *See, e.g., Administrative Record*, at pp. 42-48; 229-230; 235-236;239-240;245-248 (HEAF Promissory Notes); 81-91; 110-133; 212-216 (ISCAC Promissory Notes); 92-95; 141-149; 241-244 (MHEAA Promissory Notes); 109 (ISCAC Statement of Purchased Account, Statement 06/26/1980; 137 (Michigan Guaranty Agency Notice of Default); 140 (Michigan Guaranty Agency Statement of Purchased Account, Statement Date 09/15/1997) (R107 Screens).

The hearing officer also determined that Education hand not confused Plaintiff's account with that of another borrower,

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[5]The amount owed by Plaintiff for each of the 11 loans is listed in the table at p.2 of the Hearing Decision, attached to Administrative Record, Doc. No. 40.

Scott Wiermaa. The hearing officer found that Mr. Wiermaa has a separate account in HEAF's records and that there was no evidence to indicate that Plaintiff's account had been mixed up with Mr. Wiermaa's account. Garnishment Hearing Decision, at p. 4, attached to *Administrative Record*, Doc. No. 40.

The hearing officer also addressed Plaintiff's concerns regarding the method of notice of the administrative wage garnishment. The hearing officer noted that "[o]n June 2, 2001, an S02 letter was sent to PO Box 4803 in Newark, Ohio. This was our Notice of Proposed Wage Garnishment. It included your rights to object to the garnishment." Garnishment Hearing Decision, at p. 5, attached to *Administrative Record*. This finding is supported by the L106 Letter History Screen. *See Administrative Record*, at p. 294. As required by 20 U.S.C. § 1095a(a)(2), Education sent notice of the administrative wage garnishment to Plaintiff at his last known address.[6] There is no indication that these notices were returned undelivered.

The hearing officer addressed Plaintiff's statute of limitations and laches defenses, correctly stating that amounts owed on notes/loans to the government are not subject to a statute of limitations and that the doctrine of laches cannot be asserted against the government. Garnishment Hearing Decision, at p. 4, attached to *Administrative Record*. *See also* 20 U.S.C. § 1091a(a)(2) ("Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by (A) an institution that received funds...seeking to collect a refund due from a student on a grant made...."); *United States v. Lawrence*, 276 F.3d 193, 196 (5th Cir. 2001) ("Further, we adopt the district court's holding that

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[6]This is the same reflected in Plaintiff's filings in this case.

§ 1091a also extends to eliminate the equitable defense of laches"); *United States v. MacDonald*, 25 F.3d 1051 (6th Cir. 1994).

Furthermore, the hearing officer properly set out Plaintiff's burden of proof at the AWG Hearing. As explained by the hearing officer, Plaintiff had the burden of demonstrating that he had paid the loans in question. Garnishment Hearing Decision, at p. 2, attached to *Administrative Record*.

Plaintiff contends that the hearing officer failed to comply with the procedural requirements of the APA in rendering the AWG Hearing Decision. Specifically, Plaintiff argues that neither Education nor an Education representative appeared at the hearing, as was required by 5 U.S.C. § 556(b).[7] However, the formal hearing requirements of 5 U.S.C. § 556 do not apply to AWG Hearings. "[T]he protections of...[§ 556] are accorded only to...adjudications 'required by statute to be determined on the record after opportunity for an agency hearing.'" *Young and Bergen-Paterson Pipesupport Corp. v. Reg. Manpower Admin. U.S. Dep't of Labor*, 509 F.2d 243, 245 (9th Cir. 1975). "[I]n the absences of these magic words, Congress must clearly indicate its intent to trigger the formal on-the-record hearing provisions of the APA." *City of West Chicago, Ill. v. NCR*, 701 F.2d 632, 641 (7th Cir. 1983). *See also Doolin Sec. Sav. Bank v. FDIC*, 53 F.3d 1395, 1402 (4th Cir. 1995). An AWG Hearing, as contemplated and authorized in 20 U.S.C. § 1095a(b), requires only an informal hearing and

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[7]Section 556(b) reads in pertinent part:
There shall preside at the taking of evidence -
(1) the agency;
(2) one or more members of the body which comprises the agency; or
(3) one or more administrative law judges appointed under section 3105 of this title.

not a determination "on the record."[8] Because § 1095a does not require a determination on the record, the procedural requirements of § 556(b) do not apply to wage garnishment hearings. Accordingly, a representative of Education was not required to appear at the hearing.

Plaintiff contends that the AWG proceeding also violated 5 U.S.C. § 556 in that an employee of Education served as a hearing officer. However, § 1095a, which governs AWG Hearings, merely requires that AWG Hearings be conducted by an individual "not under the supervision or

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[8]Section 1095(a) provides in pertinent part:
(b) Hearing requirements
A hearing...shall be provided prior to issuance of a garnishment order if the individual, on or before the 15th day following the mailing of the notice...and in accordance with such procedures as the Secretary or the head of the guaranty agency, as appropriate, may prescribe, files a petition requesting such a hearing. If the individual does not file a petition requesting a hearing prior to such date the Secretary or the guaranty agency, as appropriate, shall provide the individual a hearing under subsection (a)(5) of this section upon request, but such hearing need not be provided prior to issuance of a garnishment order. A hearing under subsection (a)(5) of this section may not be conducted by an individual under the supervision or control of the head of the guaranty agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge. The hearing official shall issue a final decision at the earliest practicable date, but not later than 60 days after the filing of the petition requesting the hearing.

control of the head of a guaranty agency." 20 U.S.C. § 1095a(b). In short, Plaintiff's reliance on the procedural requirements of 5 U.S.C. § 556 is misplaced, as this provision does not apply to AWG Hearings held pursuant to 20 U.S.C. § 1095a.

The administrative Record fully supports the findings and conclusions reached by the hearing officer and establishes that the hearing officer's decision was not "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law...." 5 U.S.C. § 706(2)(A). For this reason, this Court upholds the AWG Hearing Decision issued on February 19, 2002.

Accordingly, Plaintiff's renewed motion for relief pending review of the administrative wage garnishment decision, Doc. No. 95, is **DENIED**.

B. Tort Claims Against the United States

In his second amended complaint, Plaintiff also asserts tort claims against the United States pursuant to FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, for alleged defamation of character, invasion of privacy and intentional infliction of emotional distress. *Plaintiff's Second Amended Complaint*, at ¶¶ 16-22, 24-31, 33-39. Plaintiff's tort claims against the United States are apparently based on alleged communications with Plaintiff's employer that occurred in the context of the administrative wage garnishment. *See Plaintiff's Second Amended Complaint*, at ¶¶ 15-16 (containing allegations regarding alleged communications with Plaintiff's employer, "including communications to the Auditor of Licking County, Ohio who is in charge of Plaintiff's payroll...").

1. Facts Surrounding Issuance of Administrative Wage Garnishment

An *Order to Initiate AWG* was mailed to Plaintiff's employer on July 1, 2000. *Order to Initiate AWG*, attached as Exhibit A-1 to *Complaint*. Another *Order to Initiate AWG* was also issued to Plaintiff's employer on July 10, 2001. *Id.* These letters contain only the information necessary to permit the employer to comply with the AWG Order.

2. Law Pertaining to Sovereign Immunity

"The United States, as a sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941) (citations omitted). *See also Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (absent a waiver, sovereign immunity shields the federal government and its agencies from suit). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted). Furthermore, a court must narrowly construe any waiver of the government's sovereign immunity. *Id. See also Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981) (the limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied).

3. Application

The FTCA contains a limited waiver of sovereign immunity. *United States v. Orleans*, 425 U.S. 807, 813 (1976). Title 28 U.S.C. § 1346(b)(1) states:

> Subject to the provisions of chapter 171 of this title, the district courts...shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be libel to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). *See also* 28 U.S.C. § 2674 (the United States shall be liable on tort claims to the same extent as a private individual, but shall not be liable for interest prior to judgment or for punitive damages); *Cagle v. United States*, 937 F.2d 1073, 1074 (6th Cir. 1991).

The FTCA's grant of subject matter jurisdiction is limited by certain exceptions in 28 U.S.C. § 2680. For example, the United States retains sovereign immunity under the FTCA for "any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid...." 28 U.S.C. § 2680(a). Therefore, the United States cannot be held liable in tort for an employee's acts or omissions performed pursuant to a statute or regulation, so long as due care was exercised in following the statute or regulation. *See, e.g., Doe v. Stephens*, 851 F.2d 1457, 1461-62 (D.C. Cir. 1988); *Staton v. United States*, 685 F.2d 117, 118, 121 (4th Cir. 1982).

In this case, Plaintiff's wages were administratively garnished by Education, pursuant to 20 U.S.C. § 1095a, to recover amounts allegedly due on the notes/loans at issue in this case. The evidence establishes that Education exercised due care in following the administrative wage garnishment statute,

20 U.S.C. § 1095a.[9] *See Declaration of Shirley Amey*, at ¶¶ 82-91, attached as Exhibit 2 to *Defendants' Motion for Summary Judgment*. In his deposition, Dale Smith, an employee of the credit agency that handled Plaintiff's account, testified to the specific procedures that were followed prior to initiating the administrative wage garnishment. *Dale Smith Deposition*, pp. 5-8; 11-18, attached as Exhibit 13 to *Reply of Federal Parties to Plaintiff's Opposition to Federal Parties' Motion for Summary Judgment*. Because it appears that due care was exercised in executing the wage garnishment under 20 U.S.C. § 1095a, Plaintiff's tort claims are precluded by 28 U.S.C. § 2680(a).

Furthermore, 28 U.S.C. § 2680(h)[10] excludes from the

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[9]On June 2, 2001, a letter notified Plaintiff that an administrative wage garnishment would commence if repayment were not established. On July 10, 2001, a letter was sent to Plaintiff's employer, initiating the administrative wage garnishment. On July 11, 2001, a second letter notified Plaintiff that the administrative wage garnishment would commence because there had been no response from Plaintiff to the first letter.

[10]Section 2680(h) exclude from the FTCA:
Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights:
Provided, That, with regard to acts or omissions of investigative law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment,

district court's subject matter jurisdiction, among other things, any claim under FTCA arising out of libel and slander. Therefore, Proctor's tort claim for defamation must be dismissed pursuant to Fed. R. Civ. P. 12(h)(3).[11] Plaintiff's claim for intentional infliction of emotional distress is also barred by 28 U.S.C. § 2680(h) to the extent that this claim arises form the alleged defamation. *See Hartwig v. United States*, 80 F. Supp 2d 765, 768, 779 (N.D. Ohio 1999) (claims of "intentional or negligent infliction of emotional distress" were claims arising out of defamation, and therefore barred by Section 2680(h)). For these reasons, Plaintiff's FTCA claims against the United States cannot survive the Federal Parties' summary judgment motion.

C. Judgment on Outstanding Student Loans

The Federal Parties assert a counterclaim for judgment on the amount due on the 11 student loans, plus interest. *Answer*, p. 3. "To recover on a promissory note, the government must show (1) the defendant signed the promissory note, (2) the government is the present holder or owner, and (3) the note is in default." *Lawrence*, 276 F.3d at 197 (citing *FDIC v. Selaiden Builders*, Inc., 973 F.2d 1254, 1254 (5th Cir. 1993).

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false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

[11]Fed. R. Civ. P. 12(h)(3) reads as follows: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

See also MacDonald, 25 F.3d at 1051.

The Federal Parties allege that the 11 notes were executed by Plaintiff in connection with 11 loans made under GSLP pursuant to Title IV, Part B of HEA 20 U.S.C. § 1071 *et seq.*. Three of these notes/loans were guaranteed by the Higher Education Assistance Foundation [hereinafter "HEAF"] six were guaranteed by the Iowa College Student Aid Commission [hereinafter "ICSAC"] and two were guaranteed by the Michigan Higher Education Assistance Authority [hereinafter "MHEAA"]. The Federal Parties allege that Plaintiff defaulted on all eleven of these notes/loans and that these notes/loans have been assigned to Education.

Plaintiff does not dispute that he signed the notes, that he received the amounts stated in the notes, and that he used these funds to finance his education. *See Philip Proctor Deposition*, pp. 45-52, attached as Exhibit 3 to *Federal Parties' Motion for Summary Judgment*. Plaintiff also acknowledged that he defaulted on all of these loan obligations when they were held by the original lender. *See Plaintiff's Motion for Summary Judgment*, at pp. 6, 10-12. However, Plaintiff argues that the 11 notes/loans at issue have been paid in full. Specifically, Plaintiff claims that he began making payments on the loans in the early 1990s, and that all the loans were paid in full by 1995. *Id.*, at pp. 6-7. Plaintiff, however, has presented no documentary evidence to support this assertion. The Federal Parties, on the other hand, have offered extensive documentation and other evidence that the notes/loans have not been paid, as well as evidence of the amounts currently owed on each of these notes/loans.

1. Loan Status

a. ICSAC Notes

Six of the notes at issue in this case were guaranteed by the ICSAC and were reflected in the National Student Loan Database System [hereinafter "NSLDS"] as NSLDS loan 17, NSLDS loan 14, NSLDS loan 12, NSLDS loan 11, NSLDS loan 10, and NSLDS loan 7. *Plaintiff's Motion for Summary Judgment*, at p. 8; Declaration of Shirley Amey, at ¶¶ 50-55, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment*. The Declaration of Shirley Amey establishes that the government is the present holder of each of these notes, that each of these notes is in default and the amount owed by Plaintiff to the United States in connection with each of these six notes.[12] *See* Declaration of Shirley Amey, at ¶¶ 50-55, 63-69, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment*.

b. HEAF Notes

Three of the notes/loans at issue in this case were

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[12]Plaintiff defaulted on all six notes/loans on or about November 6, 1989. ICSAC assigned each of these notes/loans to Education on or about July 14, 1998. As of February 5, 2004, the total amount Plaintiff owes to Education on each of these notes/loans is as follows:

NSLDS loan 17: $3,007.74
NSLDS loan 14: $1,198.00
NSLDS loan 12: $3,425.53
NSLDS loan 11: $6,426.32
NSLDS loan 10 [formerly NSLDS loan 8]: $4,224.92
NSLDS loan 7: $10,911.76

guaranteed by HEAF: NSLDS loan 6, NSLDS loan 3, and NSLDS loan 1. *Plaintiff's Motion for Summary Judgment*, at p. 8. *See* Declaration of Shirley Amey, at ¶¶ 56-58, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment*. The Declaration of Shirley Amey establishes that the government is the present holder of each of these notes, that each of these notes is in default and the amount owed by Plaintiff to the United States for each of these three notes.[13] *See* Declaration of Shirley Amey, at ¶¶ 56-58, 63-69, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment*.

c. MHEAA Notes

Two of the notes/loans were guaranteed by MHEAA: NSLDS loan 5, and NSLDS loan 2. *Plaintiff's Motion for Summary Judgment*, at p. 8. *See* Declaration of Shirley Amey,

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[13]NSLDS Loan 6: Plaintiff defaulted on NSLDS Loan 6 on or about March 16, 1990. HEAF assigned this note/loan to Education on or about April 20, 1993. As of February 5, 2004, the total amount Plaintiff owes to Education on this note/loan is $9,473.39

NSLDS Loan 3: Plaintiff defaulted on NSLDS Loan 3 on or about March 16, 1990. HEAF assigned this note/loan to Education on or about August 1, 1993. As of February 5, 2004, the total amount Plaintiff owes to Education on this note/loan is $4,557.99.

NSLDS Loan 1: Plaintiff defaulted on NSLDS Loan 1 on or about July 3, 1989. HEAF assigned this note/loan to Education on or about May 7, 1993. As of February 5, 2004, the total amount Plaintiff owes to Education on this note/loan is $5,210.72.

at ¶¶ 59-60, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment*. The Declaration of Shirley establishes that the government is the present holder of each of these notes, that each of these notes is in default and the amount owed by Plaintiff to the United States for each of these three notes.[14] *See* Declaration of Shirley Amey, at ¶¶ 59-60, 63-69 attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment*.

2. Payment History

The Federal Parties have submitted sufficient evidence establishing payment history to show that the 11 notes/loans at issue in this case have not been paid by Plaintiff.

a. ICSAC Notes

The Federal Parties have submitted copies of two versions of a Statement of Purchased Account [hereinafter the "Statement"] from ICSAC. *See* Declaration of Cheryl Mather, attached as Exhibit 7 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. One version of this Statement reflects a date of June 26, 1998. *Administrative Record*, p. 109. The other version of this Statement reflects a date of May 30, 2002. ICSAC records indicate that, prior to the assignment of the six loans to Education, only one payment, in the amount of $211.80, was made on any of the six loans, that

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[14]Plaintiff defaulted on both notes/loans on or about March 18, 1990. MHEAA assigned these notes/loans to Education on or about December 18, 1997. As of February 5, 2004, the total amount Plaintiff owes to Education on both notes/loans is as follows:

NSLDS loan 5: $11,812.52
NSLDS loan 2: $18,884.73

being an involuntary payment made through the IRS Federal Offset Program. *See* Declaration of Cheryl Mather, at ¶ 14, attached as Exhibit 7 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. In her declaration, Cheryl Mather states that "[i]f Mr. Proctor had made any voluntary payments on his loans while they were held by ICSAC, in accordance with the ordinary practices and procedures of ICSAC, those payments would be noted on the Statement of Purchased Account." *See* Declaration of Cheryl Mather, at ¶ 14, attached as Exhibit 7 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*.

Plaintiff acknowledges that the six notes/loans were largely unpaid at the time they were assigned to ICSAC. *See Plaintiff's Motion for Summary Judgment*, at p. 11 ("Some payments would have been made before the default to the guaranty agencies but the bulk of the payments were made during this time period'). Plaintiff has offered no documentary evidence to support his contention that he paid off these six notes/loans while they were held by ICSAC. On the other hand, Cheryl Mather's Declaration and other related documents fully support the position of the Federal Parties regarding the amounts that were owed by Plaintiff on the six notes/loans guaranteed by ICSAC at the point that they were assigned to Education. This Court concludes that Plaintiff has failed to adduce more than a scintilla of evidence to contest the issues addressed in the Federal Parties' motion for summary judgment. This, of course, is insufficient to defeat the motion for summary judgment. *Anderson*, 477 U.S. at 251.

b. HEAF Notes

In her Declaration, Laurie Paulson Huusko attests that HEAF received only on payment, in the amount of $144.27, on the three loans guaranteed by HEAF. *See* Declaration of Laurie

Paulson Huusko, at ¶ 18, attached as Exhibit 9 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. Plaintiff acknowledges that the notes/loans guaranteed by HEAF were largely unpaid at the time they were assigned to HEAF, and he fails to offer any documentary evidence to support his contention that he paid off these six notes/loans while they were held by HEAF. *See Plaintiff's Motion for Summary Judgment*, at p. 11. Plaintiff has failed to controvert the factual assertions made in the Huusko Declaration.

c. MHEAA Notes

The Federal Parties submit copies of two versions of a Statement of Purchased Account [hereinafter the "Statement"] from MHEAA. *See* Declaration of Kris Goodman, attached as Exhibit 8 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. One version of this Statement reflects a date of September 15, 1997. *Administrative Record*, at p. 140. The other version of this Statement reflects a date of June 25, 2002. In the Goodman Declaration, the declarant states that "[i]f Philip Proctor ha[d] made any payment on the two notes/loans that were guaranteed by...MHEAA between the date the...MHEAA paid the lenders/holders on their default claims (2/15/91) and the date that...the MHEAA assigned these two loans to the Department of Education (12/18/97), in accordance with the ordinary practices and procedures of the...MHEAA, those payments would be noted on the Statement of Purchased Account." Declaration of Kris Goodman, at ¶ 12, attached as Exhibit 8 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. Kris Goodman avers that, during the period that MHEAA held the two loans in question, only one voluntary payment was made by Plaintiff. *Id*. *See* attachment A, at pp. 2, 20, attached to Declaration of Kris Goodman,

Attachment C, at p. 2, attached to Declaration of Kris Goodman. In addition, Kris Goodman details efforts made, by both telephone and letter, to effect repayment of these loans. *See* Declaration of Kris Goodman, at ¶¶ 5-9, attached as Exhibit 8 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. Moreover, the MHEAA has no record of Plaintiff challenging the outstanding balances reflected on these student loans while they were held by MHEAA. *Id.*, at ¶¶ 10-11.

Again, Plaintiff acknowledges that the two notes/loans were not paid in full at the time they were assigned to MHEAA. *See Plaintiff's Motion for Summary Judgment*, at p. 11. Yet Plaintiff has offered no documentary evidence to support his contention that he paid off those notes/loans while they were held by MHEAA. On the other hand, Kris Goodman's Declaration fully support the position of the Federal Parties regarding the amounts that were owed by Plaintiff on the two notes/loans guaranteed by MHEAA when they were assigned to Education.

d. HEAF and MHEAA Loans While Held by Sallie Mae

In addition to the payment histories supplied by HEAF and MHEAA, discussed *supra*, the Federal Parties have also produced the payment history for the HEAF and MHEAA loans while these loans were held by Sallie Mae.[15] Sallie Mae's

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[15]Sallie Mae held the three HEAF loans and the two MHEAA loans prior to the time HEAF and MHEAA paid the default claims. *See* Declaration of Christin Donnelly, at ¶ 4, attached as Exhibit 10 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. Sallie Mae held the MHEAA loans from, April 29, 1986 and April 27, 1987

records indicate that no payments on the two MHEAA and three HEAF loans were made while Sallie Mae held the loans. *Id.*, at ¶ 13. This evidence lends support to the Federal Parties' position regarding the amounts that were owed by Plaintiff on these loans at the time they were assigned to the respective guaranty agencies, MHEAA and HEAF. Id., at ¶¶ 4, 12.

e. Education's Records: R107 and I100 Screens

The Federal Parties have also submitted payment information from the R107 and I100 screens from Education's DMCS computer system. *See* Declaration of Shirley Amey, at ¶ 50-60, 65,, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment.* The information reflected on the R107 screen is the same information that was included on the Statement of Purchased Accounts from MHEAA and ICSAC.[16]

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to February 11, 1991. *See Id.* Sallie Mae held the three HEAF loans from August 20, 1985 October 28, 1986, and July 31, 1987 to January 3, 1992, January 3, 1992, and November 13, 1989, respectively. *Id.* Sallie Mae held these loans before Plaintiff asserts that he had paid his notes/loans in full.

[16]Specifically, the MHEAA Statement of Purchased Accounts indicates that one payment, in the amount of $61.56, was made on March 25, 1991. The R107 screens also reflect this payment. As to the ICSAC loans, the ICSAC Statement of Purchased Account indicates that one payment in the amount of $211.80, was made through the federal offset program on May 5, 1997. The R107 screens for the ICSAC loans also reflect this payment. *See* Declaration of Shirley Amey, at ¶¶ 50-60, attached as Exhibit 2 to *Federal*

Id. Similarly, Education's payment records reflect the same payment information provided by HEAF.[17] *Id.*, at Attachment W.

3. Collection Efforts

The Federal Parties have submitted various depositions summarizing the collection attempts made by ICSAC, MHEAA, HEAF and Education. *See* Declaration of Cheryl Mather, at ¶ 11, attached as Exhibit 7 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment;* Declaration of Kris Goodman, at ¶ 5-9, attached as Exhibit 8 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment;* Declaration of Laurie Paulsen Huusko, at ¶ 21, attached as Exhibit 9 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment;* Declaration of Shirley Amey, at ¶¶ 78-81, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment.* The collection efforts made by these entities were made at a time when Plaintiff could have preserved any records of payments on his student loan accounts and ensured that proper credit was given him.[18]

Parties' Motion for Summary Judgment.

[17]As to the HEAF loans, the R107 and I100 screens indicate that an involuntary offset was made on March 4, 1991 in the amount of $144.27 and applied to NSLDS Loan 1 (a HEAF loan). This payment information is consistent with the information provided by HEAF.

[18]Among the reasons Plaintiff is unable to produce any payment history on his student loans is because the bank accounts from which these loan payments were made were closed in 1995 and financial institutions have since purged

The Federal Parties also submit evidence that Sallie Mae initiated collection efforts on Plaintiff's accounts. *See* Declaration of Christine Donnelly, at ¶ 15, attached as Exhibit 10 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment;* Supplemental Declaration of Christine Donnelly, at ¶¶ 1, 3, 4, attached as Exhibit 12 to *Federal Parties' Reply to Federal Parties' Motion for Summary Judgment;* Second Supplemental Declaration of Christine Donnelly, at ¶¶ 2, 5, 6, attached as Exhibit 14 to *Federal Parties' Reply to Plaintiff's Opposition to Plaintiff's Motion for Summary Judgment.*

4. Confusion with Scott Wiermaa's Notes

Plaintiff also suggests that Education has confused records relating to his student loans with those relating to one Scott Wiermaa. However, Plaintiff offers no evidence to support this claim. There is no evidence that any money obtained from Plaintiff was improperly credited to Mr. Wiermaa's account. *See* Declaration of Shirley Amey, at ¶¶ 70-76, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment.* Instead, the evidence suggests merely that

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the relevant account information from their systems. *Plaintiff's Motion for Summary Judgment*, at pp. 33-35. However, Bank One did not purge Plaintiff's account information until 1999. *Id.*, at 34. Similarly, Plaintiff's account at Star Bank was not purged prior to 1997. *Id.*, at 35. Plaintiff himself admits that "if Defendants had [] pursued action...in 1997/1998, it would appear that Plaintiff would have then still been able to retrieve his records from Bank One and Star/U.S. Bank." *Id.* The guaranty agencies began initiating collection efforts well before 1997.

Mr. Weirmaa's student loan documents were inadvertently placed in Plaintiff's file.[19]

While Plaintiff and Mr. Wiermaa have similar social security numbers, there is no evidence to suggest that Plaintiff's social security number was confused for Mr. Wiermaa's social security number. Plaintiff acknowledges that he signed the 11 notes at issue in this case. *See* Philip Proctor Deposition, at pp. 45-52, attached as Exhibit 3 to *Federal Parties' Motion for Summary Judgment*. The amounts in the computer records for each different lender and/or guaranty agency, and their servicer, if any, correspond to the amounts on Plaintiff's promissory notes. *See* Declaration of Shirley Amey, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment* (R107 screen amounts). *See also* Declaration of Cheryl Mather, attached as Exhibit 7; Declaration of Kris Goodman, attached as Exhibit 8; Declaration of Christine Donnelly, attached as Exhibit 10; Declaration of Laurie Paulsen Huusko, attached as Exhibit 9 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. While some of Sallie Mae's records inaccurately reflected Plaintiff's social security number, at no point is Plaintiff's social security number reflected as Mr. Wiermaa's social security number. *See* Declaration of Christine Donnelly, at ¶¶ 16, 23-31, attached as Exhibit 10 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*. Furthermore, the documents indicate that this error regarding Plaintiff's social security number was noted and corrected by Sallie Mae.[20] *Id.*

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[19]The mistake was discovered when Plaintiff found copies of Mr. Wiermaa's promissory notes among the copies of his promissory notes provided to him.

[20]It should also be noted that Sallie Mae informed Plaintiff that a problem had arisen in its records regarding his

5. Testimony of Julie Peterman

Plaintiff claims that, at one point, he had records showing that the loans/notes in question had been paid in full, but that these records were lost as the result of a theft by one Julie Peterman, a friend and social acquaintance of Plaintiff. *Plaintiff's Opposition to Federal Parties' Motion for Summary Judgment,* at p. 6; Julie Peterman Deposition, at pp. 6-8, attached as Exhibit 14 to *Reply of Federal Parties' to Plaintiff's Opposition to Federal Parties' Motion for Summary Judgment.* In her deposition, Julie Peterman testified that she did take a lockbox from Plaintiff's house. Julie Peterman Deposition, at pp. 6-8, attached as Exhibit 14 to *Reply of Federal Parties' to Plaintiff's Opposition to Federal Parties' Motion for Summary Judgment.* With regard to items in the lockbox, Ms. Peterman testified as follows:

> The lockbox had some of [Plaintiff's] items in it, as well as some of my items in there, and my items were really personal. I didn't want his items - - What he had in there. I didn't look through this stuff. I just wanted the lockbox, because I had my personal item in there that I didn't want anyone to see.

Id., at p. 8. Ms. Peterman explained that Plaintiff's personal

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social security number. *See* Declaration of Christine Donnelly, at ¶¶ 32, attached as Exhibit 10 to *Federal Parties' Opposition to Plaintiff's Motion for Summary Judgment*; Supplemental Declaration of Christine Donnelly, at ¶ 2, attached as Exhibit 12 to *Federal Parties' Reply to Plaintiff's Opposition to Federal Parties' Motion for Summary Judgment.* Hence, Plaintiff was on notice to properly monitor his student loan accounts and ensure that proper credit was given for any payments made by him.

items contained in the lockbox included receipts, canceled checks and items relating to Plaintiff's student loans. *Id.*, at pp. 12-14, 32-37. However, Ms. Peterman testified that she did not look at the canceled checks and that she did not have a specific recollection of seeing anything in the lockbox relating to the payment of the student loans. *Id.*, at p. 14, 33, 36. Ms. Peterman also explained that she left Plaintiff's personal items in the lockbox, but that the lockbox was stolen from her house in 1999. *Id.*, at 38-39. Ms. Peterman's testimony tends to establish only that a lockbox, at some point stolen, contained some records relating to some of Plaintiff's student loans. Her testimony does not provide evidence of any payment of the student loans in question.

Ms. Peterman also testified that, in 1996 or 1997, Plaintiff indicated that he wanted to buy a home and that he wanted to know how much he could afford. *Id.*, at pp. 16-17. At the time, Ms. Peterman worked as a mortgage broker at Bank One. *Id.* Ms. Peterman testified that she obtained credit information on Plaintiff form three credit reporting agencies, all of which listed student loans, all of which had been paid. *Id.*, at pp. 16-32. However, Ms. Peterman did not remember how may loans were listed. *Id.*, at p. 22. While Ms. Peterman's testimony is evidence that Plaintiff paid some student loans, her testimony does not establish that Plaintiff paid the eleven notes/loans at issue in this case.[21]

6. Defenses

Plaintiff asserts a number of defenses in his answer to the Federal Parties' counterclaim. Doc. No. 26. These defenses

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[21]The Federal Parties agree that Plaintiff paid some of his student loans, just not the eleven notes/loans at issue in this case.

are addressed below.

a. Due Diligence Defense

There has been no lack of due diligence by any party in the attempt to collect on these loans. Through the collection efforts discussed *supra*, Plaintiff has been on notice that the loans in question were not paid in full. Education and the prior holders of the notes have sought to enforce the student loans at issue in this case from 1990 to present. Consequently, Plaintiff cannot now claim a lack of due diligence.

b. Statute of Limitations Defense

In 1991, Congress amended HEA § 484A to eliminate any statute of limitations defense for suits or other actions, such as offsets, to collect government financed student loans. 20 U.S.C. § 1091a(a).[22] *See Millard v. United States Aid Funds*, 66 F.3d 252, 252 (9th Cir. 1995); *United States v. Glockson*, 998 F.2d 896, 897 (11th Cir. 1993); *United States v. Hodges*, 999 F.2d 341, 341, 42 (8th Cir. 1993); *see also United States v. Lawrence*, 276 F.3d at 196. As amended § 484A provides that litigation may be commenced, a judgment enforced, or a garnishment or offset action taken by the Federal government

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[22]Prior to this amendment, a six year limitation period applied to suits to collect loans made or guaranteed under Title IV of HEA, commencing, for FISLs, on the date the government paid a guaranty claim. 28 U.S.C. § 2415(a), or, under pre-HETA § 484A(a), on the date a GSLP or Perkins loan was assigned to Education. HEA § 484A(a)(4), 20 U.S.C. § 109a(a)(4) (1990). HETA amended § 484A to expressly abrogate these prior limitations for all HEA loans.

to collect defaulted loans regardless of any Federal or state statutes of limitation that might otherwise have applied to these collection actions.[23] 20 U.S.C. § 1091a. Moreover, the amendment to 20 U.S.C. § 1091a expressly applies to all "pending actions" to collect loans whenever those loans were made, including loans made before April 9, 1986, the date of enactment of the prior version of § 484A. Pub. L. 102-26, 3(c), as amended by Pub. L. 102-325, § 1551 (removed Nov. 15, 1992 sunset clause); *see Untied States v. MacDonald*, 25 F.3d 1051 (E.D. Mich. 1994) (The language and legislative history of the Higher Education Technical Amendments Act indicate that it was intended "to apply retroactively to all student loan collection actions") (quoting *United States v. Glockson*, 998 F.2d at 987-98). For this reason, Plaintiff's statute of limitations defense must fail.

c. Laches

In addition to eliminating any statute of limitations defense, the 1991 amendment to § 1091a eliminated all

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[23]Section 1091a provides in pertinent part:

> It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced...[N]o limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by the Secretary, [or] the Attorney General...for the repayment of the amount due from the borrower on a loan made under this subchapter.

20 U.S.C. § 1091a(a)(1), (2)(D).

limitations defenses for collection of student debts, including the defense of laches. *United States v Lawrence*, supra, 276 F. 3d 193. Recent court rulings view the abrogation of the statute of limitations defense on student loans as indicative of congressional rejection of laches as a defense to student loan debts. See *United States v McLaughlin*, 7 F. Supp. 2d 90 (D. Mass. 1998); *United States v. Davis*, 817 F. Supp. 926, 929 (M.D. Ala. 1993) ("To apply the doctrine of laches in this case would thus appear to undermine Congress's intent in eliminating the statute of limitations"), *aff'd* 17 F.3d 1439 (11th Cir. 1994). Accordingly, Plaintiff's laches defense fails as a matter of law.

d. Loan Forgiveness or Discharge

Plaintiff also claims that he is eligible for certain loan cancellations, discharges or loan forgiveness. Plaintiff claims that he is eligible for loan forgiveness under 20 U.S.C. § 1078-11,[24] which provides that, under certain circumstances, a child care provider may be eligible to participate in a loan forgiveness demonstration program. 20 U.S.C. § 1078-11. However, Plaintiff's reliance on 20 U.S.C. § 1078-11 is unfounded, as this provision was not enacted until 1998 and was not even funded for the first several years. In any event, the statute requires the borrower seeking such forgiveness to compete for the benefits under the statute, which Plaintiff has not alleged that he has done. *See* 20 U.S.C. § 1078-11(c)(3) ("[l]oan repayment under this section shall be on a first come first served basis and subject to availability of appropriations").

Plaintiff also argues that the loans at issue are subject to

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[24]Plaintiff actually cites 20 U.S.C. § 1087-11. However, it is this Court's belief that Plaintiff intended to refer to 20 U.S.C. § 1078-11.

cancellation or discharge under 20 U.S.C. § 1087ee. *See Plaintiff's Motion for Summary Judgment*, at p. 53. Section 1087ee, however, applies only to Perkins loans. As the loans in question are Federal Family Education Loan Program [hereinafter "FFELP"] loans, Plaintiff is not eligible for any loan cancellation or discharge pursuant to 20 U.S.C. § 1087ee. *See* Declaration of Shirley Amey, at ¶¶ 50-60, attached as Exhibit 2 to *Federal Parties' Motion for Summary Judgment.*

Plaintiff also argues that his student loans could be discharged in bankruptcy. *Plaintiff's Motion for Summary Judgment*, at p. 52-53. However, Plaintiff offers no evidence that he has filed for bankruptcy; arguments as to what "might" occur should Plaintiff file for bankruptcy are completely irrelevant.

e. Appropriateness Defense

Plaintiff also contends that 20 U.S.C. § 1087ff sets a limit on collections actions based on "appropriateness." *Plaintiff's Motion for Summary Judgment*, at p. 50. It is presumed that Plaintiff intended to refer to 20 U.S.C. § 1087gg, rather than 20 U.S.C. § 1087ff. Regardless, 20 U.S.C. § 1087aa through 1087ii are statutory provisions that apply to the Perkins Loan Program. The loans at issue in this case are FFELP loans, not Perkins loans. Accordingly, Plaintiff's appropriateness defense under 20 U.S.C. § 1087gg must fail as a matter of law.

f. Other

Plaintiff also argues that the Federal Parties have failed to join a necessary party. As the United States now owns the loans in question and no other parties are necessary to adjudicate this matter, this defense is meritless.

WHEREUPON, in light of the foregoing discussion,

Plaintiffs' motion for summary judgment, Doc. No. 67, is **DENIED**. The Federal Parties' motion for summary judgment, Doc. No. 68, is **GRANTED**.

The Clerk shall enter **FINAL JUDGMENT** against Plaintiff in the amount of $79,231.95, representing principal and interest accrued through July 14, 2003, plus additional interest in the amount of $5,127.27,[25] less credit for any additional amounts collected on the loans.

IT IS SO ORDERED.

March 23, 2005

s/Norah McCann King
Norah McCann King
United States Magistrate Judge

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[25]This amount represents interest accrued on the principal balance from July 15, 2003 through March 22, 2005, at a rate of $8.31 per day.

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Fifth Amendment to the U.S. Constitution (in relevant part):

No person shall be. . . deprived of life, liberty, or property, without due process of law. . . .

Fourteenth Amendment to the U.S. Constitution (in relevant part):

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

First Amendment to the U.S. Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5 U.S.C. § 552a (in relevant part):

§ 552a. Records maintained on individuals

(a) Definitions. – For purposes of this section –

(4)The term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education. . . and that contains his name, or identifying number, symbol, or other identifying particular assigned to the individual. . ."

(d) Access to records. – Each agency that maintains a system of records shall –

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him. . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him. . .

(e) Agency Requirements. – Each agency that maintains a system of records shall –

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. . ."

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained. . ."

(g)(1) Civil remedies. – Whenever any agency

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(3)(A) In any civil suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo,. . . and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

20 U.S.C. § 1095a (in relevant part):

§ 1095a. Wage garnishment requirement

(a) Garnishment requirements

[The Secretary] may garnish the disposable pay of an individual to collect the amount owed by the individual. . . provided that –

(3) the individual shall be provided the opportunity to inspect and copy records relating to the debt. . .

20 U.S.C. § 1091a (in relevant part):

§ 1091a. Statute of limitations, and State court judgments

(a) In general

(2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by –

(D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for payment of a refund due from a student on a grant made under this subchapter. . .

(b) Assessment of costs and other charges

Notwithstanding any provision of State law to the contrary –

(1) a borrower who has defaulted on a loan. . . shall be required to pay, in addition to other charges specified. . . reasonable collection costs.

28 U.S.C. § 1080 (in relevant part):

§ 1080 Default of student under Federal loan insurance program

(a) Notice to Secretary and payment of loss

Upon default by the student borrower on any loan covered by Federal loan insurance. . . and prior to commencement of suit or other enforcement proceedings. . . the insurance beneficiary shall. . . be required to meet the standards

of due diligence in the collection of the loan and shall be required to submit proof that the institution was contacted and other reasonable attempts were made to locate the borrower (when the location of the borrower is unknown) and proof that contact was made with the borrower (when location is known).

. . .

(d) Care and diligence required of holders

Nothing in this section or in this part shall be construed to excuse the holder of a federally insured loan from exercising reasonable care and diligence in the making and collection of loans under the provisions of this part.

5 U.S.C. § 706:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case

subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CFR 682.409(c) (in relevant part):

(c)(1) A guaranty agency must assign a loan to the Secretary under this section at the time, in a manner, and with the information and documentation that the Secretary requires. The agency must submit this information and documentation in the form (including magnetic media) and format specified by the Secretary. . . .

(4) For each loan assigned, the agency shall submit to the Secretary the following documents associated for each loan, assembled in the order listed below:

(v) A payment history for the loan, as described in Sec. 682.414(a)(1)(ii)(C).

(6) . . .If directed to do so, the agency must retain these documents for submission to the Secretary at some future date.

CFR 682.414(a) (in relevant part):

(a) Records. (1) (i) The guaranty agency shall maintain current, complete, and accurate records of each loan that it holds, including, but not limited to, the records described in paragraph (a)(1)(ii) of this section. The records must be maintained in a system that allows ready identification of each

loan's current status, updated at least once every 10 business days. Any reference to a guaranty agency under this section includes a third-party servicer that administers any aspect of the FFEL programs under a contract with the guaranty agency, if applicable.

(ii) The agency shall maintain –

(C) A payment history showing the date and amount of each payment received from or on behalf of the borrower by the guaranty agency, and the amount of each payment that was attributed to principal, accrued interest, and collection costs and other charges, such as late charges;

(2) A guaranty agency must retain the records required for each loan for not less than 3 years following the date the loan is repaid in full by the borrower, or for not less than 5 years following the date the agency receives payment in full from any other source. However, in particular cases, the Secretary may require the retention of records beyond these minimum periods.

(4)(i) The guaranty agency shall require a participating lender to maintain current, complete, and accurate records of each loan that it holds, including, but not limited to, the records described in paragraph (a)(4)(ii) of this section. The records must be maintained in a system that allows ready identification of each loan's current status

(ii) The lender shall keep –

(I) A payment history showing the date and amount of each payment received from or on behalf of the borrower, and the amount of each payment that was attributed to principal, interest, late charges, and other costs. . . .

CFR 682.410 (in relevant part):

(B) The agency may institute a civil suit against the borrower earlier than the first day of the period described in paragraph (b)(6)(vii) of this section. . . .

(vii) After 180 days:

(A) . . . the agency shall initiate proceedings to offset the borrower's state and Federal income tax refunds and other payments made by the Federal Government to a borrower, and shall initiate administrative wage garnishment proceedings against the borrower by the 225th day. . . .

(vii)(A) If as a result of a determination made. . . the agency does not initiate administrative wage garnishment against the borrower for repayment of the loan and the loan has not been assigned to the Department for a civil suite (sic) to be filed, the agency shall conduct diligent semi-annual inquires to determine if the borrower has since acquired the means to satisfy the debt or a substantial portion thereof through administrative wage garnishment.

(C) The guaranty agency shall document in the borrower's file determinations made pursuant to this paragraph.

(7) Alternative collection procedures for defaulted loans.

(v) Notwithstanding the deadline for instituting a civil suit set forth in paragraph (b)(6)(vii) of this section, an agency that uses the procedures in paragraphs (b)(7)(i)-(iv) of this section shall institute a civil suit required by that paragraph prior tot he earliest of –

(B) The 365th day following the later of the agency's referral of the loan to the collection contractor, or the contractor's receipt of a payment on the loan.